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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 519

THE CAMDEN FIRE INSURANCE ASSOCIATION,
A CORPORATION,
Petitioner,

vs.

JENNIE M. SUNDQUIST, ADMINISTRATRIX OF THE ESTATE OF ANTON E. SUNDQUIST, DECEASED,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

PAGE

I. Summary Statement of the Matter Involved.... 1

II. Statement as to Jurisdiction..... 9

III. Questions Presented 10

IV. Reasons Relied on for the Allowance of the Writ 10

V. Prayer for Writ of Certiorari..... 11

Brief in Support of Petition for Writ of Certiorari... 13

I. Opinion of the Court Below..... 13

II. Jurisdiction 13

III. Statement of the Case..... 14

IV. Specification of Errors..... 14

V. Summary of Argument..... 15

Point A. The Circuit Court of Appeals misunderstood and misapplied Soler & Co. v. United Firemen's Insurance Company, 299 U. S. 45.....15, 16

A false and fraudulent statement made for the purpose of procuring a falsely excessive valuation of the property lost, works a forfeiture of all claims under the policy 15

There is a point where the question of fraud and false swearing becomes one of law and beyond which the insured cannot be heard to say that his intent was innocent 15

Point B. The Circuit Court of Appeals was bound to follow the ruling of the Illinois Appellate Court in Sundquist v. Illinois Fire Insurance Company, 305 Ill. App. 160 (Appendix, p. 1) as to the admissibility of defendant's Exhibit 53 ..... 16, 20

It is now settled that decisions of intermediate Appellate Courts are of the same binding effect as decisions of the highest court of the state 16

Conclusion 22

Appendix—Opinion of the Appellate Court for the Second District of Illinois in Sundquist v. Illinois Fire Insurance Company of Peoria, 305 Ill. App. 160 i

Table of Cases.

Butler v. Security Insurance Company, 244 Ill. App. 379 ..... 15, 17

Claflin v. Commonwealth Insurance Company, 110 U. S. 81 ..... 15, 17, 18

Columbian Insurance Co. v. Modern Laundry, 277 Fed. 355 ..... 15, 17

Cuetara Hermanos v. Royal Exchange Assurance, 23 Fed. (2d) 270 (certiorari denied, 277 U. S. 590) ... 15, 17

Damen and Jarvis Building Corporation v. Mechanics' Insurance Company, 83 Fed. (2d) 793 ..... 9, 20

Domagalski v. Springfield Fire & Marine Insurance Company, 218 App. Div. 187, 218 N. Y. S. 164 ..... 16, 17

Erie Railroad Company v. Tompkins, 304 U. S. 64 ... 20, 21

Fidelity Union Trust Co. v. Field, 311 U. S. 169 ... 9, 16, 20

Hyland v. Millers National Insurance Company, 91 Fed. (2d) 735 ..... 15, 17

Kavooras v. Insurance Company of Illinois, 167 Ill. App. 220 ..... 15, 17, 18

Moreau v. Palatine Insurance Company, 84 N. H. 422, 151 Atl. 817 ..... 15, 17

Six Companies of California v. Joint Highway District, 311 U. S. 180 ..... 9, 16, 20

Soler & Co. v. United Firemen's Insurance Company, 299 U. S. 45 ..... 7, 10, 16, 17, 19, 20

Sundquist v. Hardware Mutual Fire Insurance Company, 296 Ill. App. 510 (affirmed, 371 Ill. 360) 19

Sundquist v. Illinois Fire Insurance Company, 305 Ill. App. 160 ..... 8, 10, 11

Werber Leather Coat Co. Inc. v. Niagara Fire Ins. Co., 254 App. Div. 298, 5 N. Y. S. (2d) 1 ..... 16, 17, 18

West v. American Telephone and Telegraph Co., 311 U. S. 223 ..... 9, 16, 20

Texts.

Cooley, Briefs on Insurance, Second Edition (1928), Volume 7, page 5864.....16, 18

Statutes.

United States Code, Title 28, Section 347.....9, 13

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To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

The petitioner, Camden Fire Insurance Association, a corporation, appealed to the United States Circuit Court of Appeals for the Seventh Circuit from a judgment of the District Court of the United States, for the Southern

District of Illinois, Northern Division, entered upon the verdict of a jury in the amount of $6,236.40, rendered against the petitioner in an action at law instituted by Anton E. Sundquist, the original plaintiff, upon two policies of fire insurance issued by the petitioner, in the amounts of $4,000 and $2,500, respectively, covering Sundquist's stock of merchandise and fixtures, contained in a building in Galva, Illinois (Trans. 232). The original plaintiff, Anton E. Sundquist, died while the case was pending in the trial Court, and his death having been duly suggested, the administratrix, Jennie M. Sundquist, was substituted as plaintiff. Among the defenses pleaded was that the policies were rendered void by fraud and false swearing by the insured subsequent to the loss, concerning material facts.

The policies of insurance provided:

> "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject thereof; or if the interest of the insured be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss" (Trans. 17).

In connection with the instant application, we intend to refer only to the evidence of fraud by the insured with reference to certain forged invoices, which matter was the subject of major emphasis in the opinion of the Circuit Court of Appeals. The evidence established that subsequent to the fire the insured had several meetings with representatives of the insurance companies (Trans. 111-112). Sundquist, the insured, then stated that practically all of his stock had been purchased within the last year and a half to three years, and that all of the invoices had been on top of his desk and were destroyed by fire (Trans. 112). The representatives of the insurance companies then told Sundquist that it would be necessary for him to com-

municate with the firms from which he purchased the merchandise, and obtain duplicate invoices; Sundquist said he would obtain duplicate invoices (Trans. 112). At a later meeting with the representatives of the insurance companies, Sundquist presented two purported invoices dated respectively September 26 and October 15, 1934, of the Schiller Piano Company (Defendant's Exhibits 4 and 5, Trans. 204-205), covering three Schiller pianos (Trans. 111). The invoices were forged (Trans. 116, 118). A memorandum dated September 26, 1934 (Defendant's Exhibit 6, Trans 205), containing typewriting and pencil notations in Sundquist's own handwriting (Trans. 62) was presented to the representative of the insurance companies at the same time (Trans. 111).

The three Schiller pianos, bearing numbers 67152, 66933, and 67196, listed in the forged invoices and memorandum as having been purchased by Sundquist from the Schiller Piano Company, Oregon, Illinois, in the year 1934, were actually purchased in the year 1920, as is shown by the original entries in the daily journal of that company (Defendant's Exhibits 41B, 41C and 41D, Trans. 209, 211, 213.)

In order to understand the inexorable linking of Sundquist with the forged invoices and memorandum it is necessary photographically to reproduce them. The following are photographs of the three exhibits in question:

Principal Factory and Office
OREGON, ILLINOIS

Sept-26-1934

Defendant's Exhibit 4

1 Style #10 Oak Schiller Player #67152		$365.00
1 " #10 " " " #66933		365.00
		$730.00

TERMS: 2% - 30 days

SETTLEMENT MUST BE MADE STRICTLY IN ACCORDANCE WITH THE TERMS OF THIS INVOICE

Defts Ex 21

SCHILLER PIANO COMPANY

Principal Factory and Office
OREGON, ILLINOIS

Defendant's Exhibit 5

Oct-15-1934

1 Style Mahogony Schiller Player #67196	$365.00

TERMS: 2% - 30 days

SETTLEMENT MUST BE MADE STRICTLY IN ACCORDANCE WITH THE TERMS OF THIS INVOICE

Defts. Ex. 30

Defdt. Ex 6

Defendant's Exhibit 6

Sept-26-1934

1 Style #10 Oak Shiller Player #67152	$365.00
1 " #10 " " " #66933	365.00
1 " " Mah. 86 mk 67196	$730.00
	365.00

~~2 Style #10 Oak~~

Verse Low 2 Style N Burn Mahogany Player { 430 / 430

1 Cobb Nelson reg - 165.00

1 Bush & Gerts player - 385.00

~~1 Style #10 Mahogony Schiller Player #67196 $365.00~~

1 Hamilton — 260.

8. new

~~2 - Oak~~ 1 used piano - 125.

3 - used 1 " " 60

1 " " 60.

71

Deft ex 29

It was admitted that all of the writing in pencil on Defendant's Exhibit 6 was in Sundquist's own handwriting (Trans. 62). There appears in Sundquist's own handwriting on Defendant's Exhibit 6 the following: "1 " " Mah. 88 note 67196 ($) 365.00." The typewriting on the forged Schiller piano invoice (Defendant's Exhibit 5) reads: "1 Style Mahogony Schiller Player #67196 $365.00." The typewriting on Sundquist's memorandum was prepared prior to his writing thereon in longhand. This is conclusively shown by the fact that part of the typewriting in Defendant's Exhibit 6 has been crossed out in pencil, and by the ditto marks in the line "1 " " Mah. 88 note 67196 365.00." The words and figures in typewriting which appear on Defendant's Exhibit 6, are identical with the words and figures on the two forged Schiller Piano Company invoices. Even the same layout, the same use of dashes in the date, and the incorrect spelling of the word mahogany are common to all of these documents.

The daily journal of the Schiller Piano Company (Defendant's Exhibits 41B, 41C, and 41D) shows that the three Schiller pianos identified by their serial numbers, 67152, 66933, and 67196, in the two forged invoices and in the Sundquist memorandum, had been purchased in 1920 (Trans. 209-213). Sundquist in the forged invoices and his memorandum represented that they were purchased in the year 1934. The pianos were of the player-piano type, and the evidence established that pianos of this type, manufactured in 1920, declined very rapidly in value thereafter (Trans. 118, 149-150). There was no evidence to the contrary. As further bearing on the question of falsely dated invoices, the following letter was written by Sundquist in January of 1937:

"Jan. — 7 — 1937.

"*Cable Company,*
Wabash Ave.,
Chicago, Ill.

GENTLEMEN:

We had a fire at our store and we had a complete loss. We had one Cable Company player piano which we think was billed to us at about $260 and we also had one Hamilton Straight Piano which we think was billed at about $145.00 or possibly more. Our adjusters say we have to get duplicate bills on these as our bills were all burned up.

Wondered if you would help us out by sending us duplicate bills on these two numbers and date them a few years back—about '33 or '34.

Sincerely,
Sundquist & Son,
By A. E. Sundquist.

"P. S. We also had in stock a new Bush & Gerts player piano—do you handle them and if not do you know where we could get a duplicate billing on this Bush & Gerts player piano.

This would be a great accommodation if you could help us out on this—and please send us a circular of your small pianos as we have a customer at the present time" (Trans. 204).

In fact the last piano which Sundquist had purchased from the Cable Piano Company was bought in January of 1928 (Trans. 202-203).

No evidence was offered by plaintiff explaining or attempting to explain any of the matters above stated. In the Circuit Court of Appeals the contention was advanced that the documents were manufactured by defendant; there is no evidence in support of this contention.

The trial Court refused to direct a verdict on the issue of fraud and false swearing and this ruling was approved by the Circuit Court of Appeals. The Circuit Court of Appeals, on the authority of *Soler & Co.* v. *United Fire-*

men's Insurance Company, 299 U. S. 45, held that the issue of fraud and false swearing was one of fact for the jury.

One of the principal issues in the case upon the trial thereof was the fraud and false swearing by the insured with reference to the age and value of the property insured. The insured contended that the stock and fixtures were all relatively new and had all been acquired within a year and a half to three years prior to the fire (Trans. 112). To meet this issue, defendant introduced evidence that the stock and fixtures were much older than was claimed, that a large part of the stock was obsolete, that the fixtures were not modern, and in support of this contention defendant offered in evidence Exhibit No. 53, being an inventory of the stock and fixtures purchased by Sundquist at a bankruptcy sale in 1922, which was the starting point of his business (Trans. 215). Many of the items listed in the bankruptcy appraisal (Defendant's Exhibit 53; Trans. 215) were identical in name and description with items appearing in Sundquist's schedule of property lost submitted after the fire (Plaintiff's Exhibit 4; Trans. 181). For example, Edison phonographs are common to both. Such phonographs were not manufactured after 1930 and had no value in 1936 (Trans. 150). The trial Court held this evidence inadmissible (Trans. 142). At the time the case was tried in the District Court there was pending, but undecided, before the Appellate Court for the Second District of Illinois, an appeal in the companion case of *Sundquist* v. *Illinois Fire Insurance Company,* 305 Ill. App. 160 (Appendix, p. 1). The latter case arose out of the same fire, the policy there involved covering the same property as that insured under petitioner's policies. The case was tried in the state Court. On April 6, 1940, some four months after the conclusion of the trial in the instant case, the Appellate Court for the Second District of Illinois handed down its opinion, and held that Exhibit

53 was admissible in evidence. The Appellate Court for the Second District of Illinois reversed the judgment of the trial Court, and remanded the case for a new trial. No appeal was taken to the Supreme Court of Illinois, and the opinion of the Appellate Court remains in full force and effect as stating the Illinois law upon the issue involved.

Upon appeal to the Circuit Court of Appeals, it was contended that the Court was bound to follow the ruling of the Appellate Court as to the admissibility of the identical exhibit, but the Circuit Court of Appeals did not take the same view as the Appellate Court, stating that the 1922 inventory was not material. The Court did not discuss the binding effect of the Appellate Court decision as to the admissibility of the identical evidence. It was not until after the briefs had been filed in the Circuit Court of Appeals that the opinions of this Court were handed down in the cases of *Six Companies of California* v. *Joint Highway District,* 311 U. S. 180; *West* v. *American Telephone and Telegraph Co.,* 311 U. S. 223, and *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, in which decisions this Court finally put at rest a question as to the binding effect of decisions of intermediate courts of appeal upon Federal tribunals. Prior to the decisions last referred to, there had been a divergence of opinion in the United States Circuit Court of Appeals as to the binding effect of decisions of Illinois Appellate Courts. See *Damen and Jarvis Building Corporation* v. *Mechanics' Insurance Company,* 83 Fed. (2) 793.

II.

Statement as to Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the United States Code, as amended (United States Code, Title 28, Section 347). The judgment of the United

States Circuit Court of Appeals for the Seventh Circuit was rendered on March 17, 1941. Petition for rehearing was denied on June 11, 1941.

III.

Questions Presented.

Two questions are raised by this petition:

1. Whether the United States Circuit Court of Appeals for the Seventh Circuit erred in refusing to reverse the judgment of the Court below, for the reason that the petitioner was entitled to a directed verdict upon the trial of the case, by reason of the fraud and false swearing perpetrated by the insured on the petitioner. The ruling of the Circuit Court of Appeals rested upon a misapprehension of the effect of the case of *Soler & Co.* v. *United Firemen's Insurance Company,* 299 U. S. 45.

2. Whether the Circuit Court of Appeals was bound to follow the decision of the Appellate Court for the Second District of Illinois in the companion case, *Sundquist* v. *Illinois Fire Insurance Company* (305 Ill. App. 160; Appendix, p. 1) as to the admissibility of an identical exhibit.

IV.

Reasons Relied on for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals was predicated upon a misunderstanding of the scope and effect of the decision of this Court in *Soler & Co.* v. *United Firemen's Insurance Co.,* 299 U. S. 45.

2. The refusal of the Circuit Court of Appeals to follow the decision of the Appellate Court for the Second District of Illinois as to the admissibility of defendant's Ex-

hibit 53, the Appellate Court for the Second District of Illinois having held the exhibit admissible in *Sundquist* v. *Illinois Fire Ins. Co.*, 305 Ill. App. 160 (Appendix, p. 1).

V.

Prayer for Writ of Certiorari.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record of all proceedings in the case entitled on its docket No. 7360, *Jennie M. Sundquist, Administratrix of the Estate of Anton E. Sundquist, deceased, appellee* v. *The Camden Fire Insurance Association, a corporation, appellant,* and that said judgment of the United States Circuit Court of Appeals for the Seventh Circuit be reversed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

THE CAMDEN FIRE INSURANCE ASSOCIATION, a corporation,

By Herbert V. Wittich

Counsel for Petitioner.